



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF N-D-O-E-

DATE: OCT. 4, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a public school system, seeks to classify the Beneficiary as a mathematics teacher of exceptional ability. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary qualifies as an individual of exceptional ability or that the position requires someone with that level of expertise.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional documentation and maintains that the Director erred in his analysis of the evidence.

Upon *de novo* review, we will dismiss the appeal.

**I. LAW**

Section 203(b)(2) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent, or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Unless seeking a waiver in the national interest, the petition must be accompanied by a valid, individual labor certification or an application for Schedule A delegation that demonstrates the job requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). In the instant case, the Petitioner secured an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

In explaining the evidentiary requirements, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria related to exceptional ability. Specifically, a petitioner must provide documentation that

satisfies at least three of these criteria in order to meet the initial requirements for this classification. The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the “truth is to be determined not by the quantity of evidence alone but by its quality”).<sup>1</sup>

## II. ANALYSIS

The two issues on appeal are whether the Beneficiary meets the eligibility requirements for an individual of exceptional ability and whether the position requires an individual with that level of expertise. On appeal, the Petitioner maintains that where a petition follows the permanent labor certification process (PERM) with DOL, U.S. Citizenship and Immigration Services (USCIS) is limited in its review of the Beneficiary’s credentials and job requirements, and may not consider whether the evidence in the aggregate is consistent with the regulatory definition of exceptional ability. For the reasons discussed below, we find that the record supports the Director’s decision.

### A. Exceptional Ability Analysis

The relevant statute, case law, a precedent decision, and USCIS policy all support the Director’s two-step analysis. The statute expressly advises that “the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.” Section 203(b)(2)(C) of the Act. Thus, the statute contemplates that USCIS will consider on a case-by-case basis whether an individual’s credentials are, in fact, indicative of the necessary level of expertise. A federal circuit court considered a first preference petition that, while not a PERM case, involved regulations that similarly list criteria that may demonstrate eligibility.<sup>2</sup> That court found that while USCIS is limited to the plain language of the criteria when considering whether a criterion is satisfied, USCIS may then perform a final merits determination that analyzes the filings in the aggregate.<sup>3</sup> The Petitioner has not explained why the court’s reasoning is not persuasive to PERM cases.<sup>4</sup> Similarly, as quoted above, a USCIS precedent clarifies that we look not simply at the quantity but also the quality of the evidence.<sup>5</sup> Finally, it is

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<sup>1</sup> Cf. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> While DOL certified the labor certification, DOL determines only that there are not sufficient workers who are able, willing, qualified, and available and that the employment will not adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act. USCIS has the authority to make preference classification decisions. *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983). See also *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984).

<sup>5</sup> *Chawathe*, 25 I&N Dec. at 376.

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USCIS policy that we perform a two-step analysis in exceptional ability cases.<sup>6</sup> The memorandum does not distinguish between these cases whether based on a PERM labor certification, Schedule A, or a national interest waiver of the job offer.

### 1. Evidentiary Criteria

The Director agreed with the Petitioner that it had satisfied three criteria. The record supports that determination. The Beneficiary has a three-year bachelor of science degree, a three-year bachelor of education degree, and a two-year master of science degree. An evaluation of this education from [REDACTED] concludes that the Beneficiary “has attained the equivalent of a **Bachelor of Education degree and a Bachelor of Science degree in Mathematics** from an accredited institution of higher education in the United States.” Accordingly, the Director correctly found that the Beneficiary meets the academic credential criterion. 8 C.F.R. § 204.5(k)(3)(ii)(A). Next, the Beneficiary is certified by the [REDACTED] to teach mathematics in grades 7-12. Thus, the record supports the Director’s conclusion that the Beneficiary meets the license or certification criterion. 8 C.F.R. § 204.5(k)(3)(ii)(C). Finally, the Petitioner documented the Beneficiary’s membership with the [REDACTED]. As stated by the Director, this item meets the professional membership criterion. 8 C.F.R. § 204.5(k)(3)(ii)(E).

### 2. Evidence in the Aggregate

As the Petitioner satisfied three of the regulatory criteria, we now consider the totality of the record to determine if it has demonstrated, by a preponderance of the evidence, that the Beneficiary is an individual with a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.<sup>7</sup> If so, the Petitioner has met the requisite burden of proof and established eligibility for visa classification as a foreign national of exceptional ability.<sup>8</sup>

The Director concluded that a bachelor’s degree is “commonly encountered among teachers,” that a license is a standard credential for teachers, and that the Petitioner had not demonstrated that union membership is indicative of a degree of expertise above that ordinarily encountered. On appeal, the Petitioner does not address any of these concerns; stating only that further review of evidence deemed to satisfy a criterion is “subjective” and “prohibited in the PERM process.” In support of the appeal, the Petitioner does not provide statistics regarding the percentage of teachers with at least a

<sup>6</sup> USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14 4*, 20-23 (Dec. 22, 2010), <https://www.uscis.gov/laws/policy-memoranda>.

<sup>7</sup> 8 C.F.R. § 204.5(k)(2) (definition of exceptional ability). Eligibility is to be determined not by the quantity of the filings alone but by their quality. *Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm’r 1989)). We “examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence.” *Id.*

<sup>8</sup> See § 203(b)(2)(A), (C) of the Act; 8 C.F.R. § 204.5(k)(2), (3)(ii); cf. *Kazarian*, 596 F.3d at 1119-20.

baccalaureate and union membership. The appeal does include a state statute requiring that teachers be certified, confirming that it is a standard credential for teachers.

For the reasons discussed above, a qualitative analysis of the submitted evidence is appropriate. Moreover, it is not a purely subjective inquiry to ask whether the Beneficiary's credentials are routine in the occupation. Ultimately, the Petitioner established that the Beneficiary is well-educated, has the minimum certification for the job, and joined the union. The record does not demonstrate, however, these factors are indicative of a degree of expertise as a teacher significantly above that ordinarily encountered in the sciences, arts, or business.

### 3. Summary

While the Petitioner satisfied three of the criteria, it did not demonstrate that the Beneficiary's credentials and membership are indicative of a degree of expertise significantly above that ordinarily encountered rather than prerequisites for employment in the occupation. Accordingly, the Petitioner has not established the Beneficiary's eligibility for classification as an individual of exceptional ability.

#### B. The Job Requirements

The job offer portion of the individual labor certification must demonstrate that the position requires an individual of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). The Petitioner indicated on the labor certification that the job, which has a specialty occupation classification (SOC) code of 25-2031, required a bachelor's degree in education, mathematics, or a field related to mathematics; no experience in the job offered or an alternate occupation; and eligibility for state licensing. The Petitioner listed the prevailing wage as \$41,172 per year and the proposed wage range from that amount to \$67,637 annually. The Petitioner supplied Foreign Labor Certification (FLC) wage data for those working in the occupation with the SOC code 25-3099. The data shows a wage range in the annual salary of \$21,300 through \$52,330. The Petitioner also presented information about the [REDACTED] which oversees all state-funded education, contending that all teachers are automatically members of this entity.

As the Director correctly found that the job requires a degree, at issue is whether the job requirements match two other criteria and, if they do, whether they are indicative of a position that requires an individual of exceptional ability. The Director concluded that requiring eligibility for licensure is not the same as requiring possession of a license. The Director also found that the Petitioner had not shown that the offered salary demonstrates exceptional ability as the submitted FLC data was for a different SOC code than the occupation certified. Finally, he concluded that the state constitution did not reference the Beneficiary or the job and, thus, the Petitioner had not established that the job requires membership in [REDACTED]. On appeal, the Petitioner maintains that the labor certification need only require three elements from the list of exceptional ability criteria. The Petitioner also submits case law for the proposition that a labor certification need not list requirements that are inherent to the position and state statutes regarding certification of teachers.

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Regarding the specific job requirements, the Petitioner contends that because, by law, all teachers in the state must be certified, the position requires a license or certification, meeting the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). We accept that the job requires a license or certification. Therefore, the job does require a second element under the exceptional ability criteria.

Next, the Petitioner explains that the SOC code on the labor certification no longer exists, concluding that the evidence of record shows that the offered wage is “two to three times higher than the Department of Labor’s own wage data,” thus corresponding to the salary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D). The SOC code 25-2031, which relates to secondary teachers, does still exist.<sup>9</sup> That said, it is not one of the occupations under the American Competitiveness and Workforce Improvement Act (ACWIA) Education database, which the Petitioner affirms DOL requires it to use. Regardless of whether DOL requires the Petitioner to use ACWIA because it is affiliated with a university system, it has not demonstrated that the data provided, entry level wages for SOC code 25-3099, “Teachers and Instructors, All Other,” is a meaningful comparison to the offered wage for a secondary teacher.<sup>10</sup> The bottom range of the proposed wage matches the prevailing wage. The Petitioner has not shown that tendering the prevailing wage indicates that the job requires an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(D).

Regarding membership in professional associations, it is the Petitioner’s position that the Beneficiary is a member of [REDACTED] “a professional association which, per the New York State Constitution, all teachers become members, by operation of law.” In response to the Director’s finding on this issue, the Petitioner notes that as the constitution predates the Beneficiary, it cannot be expected to name her personally. The state constitution requires the legislature to provide for the maintenance and support of a system of free common schools and recognizes [REDACTED] as the entity with oversight over that system. Materials in the record describe [REDACTED] as “the most complete, interconnected system of educational services in the United States,” including 240,000 certified public school teachers, counselors, and administrators. While we agree with the Petitioner that a state constitution would not be expected to list members and specific jobs, it has not documented that the 240,000 public school employees [REDACTED] oversees are “members” of that entity. The appellate brief contends that “membership” in [REDACTED] is “automatic and compulsory and is actually written into” the state constitution. Unsupported statements in a brief do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The constitution makes no mention of “members” of [REDACTED] rather, it recognizes the entity’s existence. The information the Petitioner presented about [REDACTED] make no mention of “members.” Instead, they

<sup>9</sup> *See* O\*NET OnLine Summary Report for 25-2031.00 – Secondary School Teachers, Except Special and Career/Technical Education, <http://www.onetonline.org/link/summary/25-2031.00>.

<sup>10</sup> O\*Net includes SOC codes for middle school teachers and elementary school teachers, SOC codes 25-2022, 25-2021 respectively, as well as the 25-2031 code for secondary teachers. *See* O\*NET OnLine Quick Search for teachers, <http://www.onetonline.org/find/quick?s=teachers>. As such, the statistics for the SOC code 25-3099 omit the salaries of all primary and secondary teachers.

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show that the organization oversees public education. Those responsibilities do not imply it is a professional association that admits members automatically or otherwise. In light of the above, the Petitioner has not demonstrated that the job requires membership in [REDACTED]

Finally, the Petitioner maintains that the wage offer information comes from the Collective Bargaining Agreement (CBA) negotiated by [REDACTED]. Based on this information, the Petitioner concludes that membership in [REDACTED] "is subsumed within the required wage section of the job offer portion of the PERM application." The Petitioner further notes that it provided [REDACTED] with a notice of filing. The Petitioner does not sufficiently explain how the fact that wages were negotiated by a union indicates that the job requires union membership. Accordingly, it has not demonstrated that the job requires a professional membership. 8 C.F.R. § 204.5(k)(3)(ii)(E).

For the reasons described above, the job requirements do not reveal that the job requires an individual of exceptional ability. Even if we accepted that the labor certification addressed three elements of exceptional ability, as discussed with respect to the Beneficiary's qualifications, the requirements for all of those elements are inherent to the occupation. Specifically, the Petitioner has not stated or documented that a bachelor's degree is above that ordinarily encountered among teachers. It has shown that certification is a requirement for all teachers in the state. Assuming that [REDACTED] is a professional association that admits members, the Petitioner maintains that membership is automatic for every public school teacher. The record also does not contain evidence that union membership is reflective of a degree of expertise in the sciences, arts, or business. Finally, the Petitioner confirms that the union negotiates the salaries for teachers; accordingly, the offered wage is standard for all teachers. All of these factors in the aggregate demonstrate that the job does not require an individual with a degree of expertise above that ordinarily encountered in the sciences, arts, or business.

### III. CONCLUSION

The Petitioner has not demonstrated that the job requires an individual of exceptional ability or that the Beneficiary has such expertise. Accordingly, the Petitioner has not met its burden to establish eligibility for the immigration benefit sought. See Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

**ORDER:** The appeal is dismissed.

Cite as *Matter of N-D-O-E-*, ID# 7982 (AAO Oct. 4, 2016)